No. 91-1866

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DANIEL WEISS, PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION AND
THE STATE OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

References to the parties, the record and the documents contained in the Appendix to the Petition for Writ of Certiorari will follow the system of notation set forth in the Petition. Respondents' Brief will be referred to as "RB," followed by the appropriate page number.

ARGUMENT AND AUTHORITIES

The Respondents argue that the Court must ignore the fact that to date Weiss has been incarcerated for over two years. Instead, the Respondents ask this Court to pretend, for the purpose of deciding whether to grant certiorari, that time has stood still and that Weiss has spent only three months in prison since the entry of the contempt order. (RB at 5-6)

Respondents have provided no authority for their contention that the Court is required to ignore the reality of the passage of time.

Furthermore, Respondents incorrectly state that Petitioner is presently serving a concurrent State criminal sentence. (RB at 5 N.3) That sentence expired on May 24, 1992. In fact, as pointed out in the Petition, had the District Court granted Weiss' Motion to Terminate the Order of Contempt, his State sentence would have terminated earlier. (Pet. at 11)

In the opinion below, the Eleventh Circuit considered the total length of imprisonment and noted that Weiss still remained incarcerated as of the date that the decision was rendered on his appeal,

January 14, 1992. (App. A-9-10) There is nothing in the Eleventh Circuit opinion to indicate that this factual finding was merely gratuitous or that appellate review had been limited to a determination of the coercive effect of only the first three months of Weiss' imprisonment. Respondents do not challenge the Eleventh Circuit's authority to consider the purpose and effect of the actual length of incarceration, but they now argue that this Court cannot review the stated basis for the Eleventh Circuit's decision and use that same factual basis for its decision.

This Court has always held that if it is necessary for the purposes of justice, any change in the facts or the

law that has occurred since the judgment under review was entered should be considered. In Patterson v. Alabama, 294 U.S. 600, 607, 55 S.Ct. 575, 578, 79 L.Ed.2d 1082, ____ (1935), this Court stated:

> We have frequently held that in the exercise of our appellate jurisdiction we have the power not only to correct error in the judgment under review, but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change in fact or in law, which has supervened since the judgment was entered.

In Ashcroft v. Tennessee, 322 U.S. 143, 156, 64 S.Ct. 921, 927, 88 L.Ed.2d 1192, ____ (1944), this Court repeated its earlier holding that new factual or legal developments should be considered:

> In disposing of cases before us it is our responsibility to make such disposition as justice may require. "And in determining what justice does require, the Court is bound to consider any change in fact or in law, which has supervened since the judgment was entered."

Id., quoting, Patterson, 294 U.S. at 607. These cases show that the Court does not need to close its eyes to the fact that Weiss is still in jail and what is really being appealed is not a three month sentence, but a term of imprisonment for which there is currently no end in sight.

Further, this Court has previously considered the total time that a contemnor has been imprisoned, from the date of his initial incarceration to the date of this Court's decision on his petition. In McNeil v. Director,

Patuxent Institution, 407 U.S. 245, 92 S.Ct. 2083, 32 L.Ed.2d 719 (1972), this Court repeatedly noted that the contemnor remained incarcerated at the time the decision was rendered. Id. at 246, 252, 92 S.Ct. at 2085, 2088. The Respondents have not offered any authority or any reason to support its position that this Court should now reject the manner of "determining what justice does require" that it has consistently followed for decades in the above-cited line of cases.

The Respondents' Brief does correctly point out that Weiss has not brought the issue of the denial of his two subsequent Renewed Motions to Terminate Order of Civil Contempt under the jurisdiction of this Court by strictly complying with Rule 11, Supreme

Court Rules.[1] It is interesting to note, however, that while the Respondents urge the Court to ignore the fact that the Renewed Motions have been filed and denied, they repeatedly refer to the Renewed Motions in their Brief and argue that the possibility of filing further renewed motions, which may eventually be granted at some indeterminate point in the future, affords Weiss an adequate remedy. (RB at 4 n.1, 5)

But the failure to invoke Rule 11 does not bar this Court's consideration of the subsequent related motions. In Roe v. Wade, 410 U.S. 113, 123, 93 S.Ct.

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[1] Weiss' second Motion to Terminate was denied on October 23, 1991. His Renewed Motion was denied on July 6, 1992, after Weiss had already filed his Petition for Writ of Certiorari.

705, 711-712, 35 L.Ed.2d 147, ___ (1973), this Court held that the failure to comply with Rule 11 will not bar review of related, but separate, actions. In Roe, a companion declaratory relief action was still at the Circuit Court level at the time that the petition for writ of certiorari was filed before this Court. The Roe Court held that while it may have been better procedure to include the declaratory relief action in the petition for certiorari by invoking Rule 20 [the former version of Rule 11], the Court would not be foreclosed from considering both cases, since one action was properly before the Court and the arguments and issues were the same in both cases. Id. at 123, S.Ct. at 711-712.

Under Roe, the Court should consider the denial of the two Renewed Motions to Terminate even though Weiss did not strictly comply with Rule 11. To require Weiss to remain in jail pending separate reviews of his Renewed Motions would serve no purpose and would simply delay full consideration of his case. As this Court stated in Roe:

> It would be destructive of time and energy for all concerned were we to rule otherwise.

Id. at 123, 93 S.Ct. at 712. As in Roe, there is no reason to require Weiss to file, or to require this Court to rule upon, multiple petitions for certiorari where the factual and legal issues are identical and the only new matter raised in the subsequent motions is the

inevitable and predictable passage of time.

The sole remaining argument advanced by the Respondents as a basis for the denial of Weiss' Petition is their contention that the level of judicial scrutiny afforded to Weiss by the Eleventh Circuit, "virtually unreviewable discretion," is sufficient to protect a contemnor's due process rights regardless of the length of the detention. (RB at 7-8) The position urged by the Respondents would constitute a complete rejection of this Court's long standing recognition that coerciveness is inversely proportionate to duration, a guiding principle that this Court and the Circuit Courts have consistently followed since it was first set forth in Maggio v.

Zeitz, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed.2d 476 (1948). The denial of Weiss' Petition for Writ of Certiorari on this basis, the Respondents' only remaining argument, would require that this Court reject over fifty-seven years worth of legal precedent. Since the Respondents have failed to provide this Court with any reason to adopt such a radical departure from its earlier decisions, either based upon fact or upon law, Weiss urges that certiorari review is necessary to bring the Eleventh Circuit's decision into conformity with those of this Court and the other Circuit Courts that have considered this issue, to preserve Weiss' due process right to be free from punitive incarceration for

civil contempt and to provide guidance in future cases.

CONCLUSION

WHEREFORE, Petitioner DANIEL WEISS respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari and review the both the standards used in reaching the decision on his Motion to Terminate, reverse the decision denying his Motion, and order the termination of the sanctions imposed by the District Court.

Respectfully submitted,

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Attorney for Petitioner

and

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail to Kenneth W. Starr, Solicitor General, Department of Justice, Washington, D.C. 20530; Gary L. Printy, Assistant General Counsel, Department of Banking and Finance, The Legal Section, Suite 1302, The Capitol Building, Tallahassee, FL 32399-0350; Victor L. Reid, Esq., Office of the General Counsel and Dennis O'Keefe, Esq., Commodity Futures Trading Commission, 2033 "K" Street, N.W., Washington, D.C. 20581, this 19 day of August, 1992.

MARC S. NURIK
Attorney for Petitioner